LEKEN GERIK (M)

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN JC
[CRIMINAL APPEAL NO: 42-14-2006-II]
26 MARCH 2007

CRIMINAL PROCEDURE: *Sentence - Appeal against - Appellant charged with three separate offences of incest - Penal Code, ss. 376A, 376B - Whether treated as a single crime committed over a period of time or separated into several and distinct offences - Rape and incest - Whether entirely different offences - Concurrent or consecutive - Exercise of court's discretion - Mitigating factors - Public interest - Whether 30 years' imprisonment excessive for non-violent offence - Whether there was failure on part of trial court to apply the right sentencing principles - Penal Code, s. 71 - Subordinate Courts Act 1948, s. 102 - Criminal Procedure Code, ss. 171,171A*

CRIMINAL PROCEDURE: *Sentence - Concurrent or consecutive - Exercise of court's discretion - Appellant charged with three separate offences of incest - Penal Code, ss. 376A, 376B - Whether treated as a single crime committed over a period of time or separated into several and distinct offences – Mitigating factors - Public interest - Whether 30 years imprisonment excessive for non-violent offence - Whether there was failure on part of trial court to apply the right sentencing principles - Penal Code, s. 71 - Subordinate Courts Act 1948, s. 102 - Criminal Procedure Code, ss. 171, 171A*

CRIMINAL PROCEDURE: *Sentence - Principles of sentencing - Public interest - Mitigating circumstances - First time offender - Local factors - Whether taken into account - Exercise of court's discretion - Whether 30 years imprisonment excessive for non-violent offence - Whether there was failure on part of trial court to apply the right sentencing principles - Penal Code, s. 71 - Subordinate Courts Act 1948, s. 102 - Criminal Procedure Code, ss. 171,171A*

The appellant was charged in the Sessions Court for three separate offences of incest with his 17 year old stepdaughter under the new provision of s. 376A of the Penal Code ('the Code'). The appellant pleaded guilty to all the amended charges and was sentenced to 10 years imprisonment and a whipping of three

A strokes for each offence with an order for the sentence to run consecutively. The appellant filed a statutory notice of appeal and petition of appeal. He prayed that the sentence be reduced and to run concurrently. As the appellant was not legally represented, this court accepted the petition of appeal in its original form and
B held that the issue of law was related to s. 102 of the Subordinate Courts Act 1948 (SCA 1948) which deals with the manner distinct offences in respect of sentencing must be dealt with and in respect of the facts whether the correct sentencing principles have been considered before the appellant was sentenced. The
C respondent objected to the appeal and submitted that: (i) the charges in this case were separate and distinct offences and the sentences must be consecutive and not concurrent; (ii) the trial court had taken judicial notice of the rampancy of the offence and it was in the public interest that a severe sentence must be met.
D The issue that arose was whether incest must be treated as a single crime committed over a period of time or whether the prosecution could separate the act of incest during a period of time into several and distinct offences (subject to s. 164 of the Criminal Procedure Code) and claim they were separate and
E distinct offences.

Held:

(1) Under s. 376A of the Penal Code, for incest to be an
F offence it necessarily requires parties to have performed sexual intercourse and does not deal with any form of other sexual overacts within persons who are prohibited from marrying each other under the law, religion, custom or usage. Thus, s. 376A does not cover all form of incestuous
G relationship and is limited to one where sexual intercourse has actually taken place and parliament has made it an offence to have sexual intercourse within the prohibited degrees. The section itself does not mention whether the conduct of incest must be taken as one offence or whether
H a person can be charged for each and every penetration in the act of sexual intercourse under the pretext that each penetration is a separate and distinct offence. (para 14)

(2) For effective, meaningful and just administration of criminal
I justice, it requires great conviction and commitment on the part of the prosecution to ensure that the offender was not charged for several offences of the same kind on the same

victim as far as possible and necessary; therefore trial court must as far as practicable see to it that the sentences does not exceed the statutory maximum imposed by parliament on the said offence even though the prosecution has preferred several charges of the same kind and on the same victim with a view of securing a severe sentence in aggregate. In fact, in such cases the court must consider a concurrent sentence as opposed to a consecutive one as provided for in s. 102 of the Subordinate Courts Act 1948. (para 17)

(3) Interest of justice would be better served if this court considered that incest on the facts of this case was a single crime for purpose of sentencing only. This court does not intend to impose to a first offender a sentence more than that prescribed in s. 376B of the Penal Code. The discretion, as to sentencing of the offender, vests entirely with the court. There was failure herein on the part of the trial court to apply the right sentencing principles and much reliance was based on public interest without any consideration to the other norms relating to sentencing. Public interest, though an important consideration in itself, could not be the sole criteria in assessing sentence; there were other considerations which must be dealt with before the sentence could be said to have been passed according to law. (paras 18 & 20)

(4) There were a number of prejudices in the observations of the learned Sessions Judge the appellant was made to suffer. First the learned Sessions Judge said incest rape was rampant. Incest and rape are two entirely different types of offences. Rape is seen to be a crime of violence whereas incest is a crime of passion or obsession, though the act is unchaste and deplorable. Further, incest is between consenting parties and rape is otherwise. Further, the learned Sessions Judge had taken judicial notice of the number of rape cases and concluded that incest rape was rampant. It was not the correct approach (*Public Prosecutor v Alfred a/l Vincent)*. (para 22)

(5) In cases where it was not a violent crime and where it was moral in nature the reformative considerations must be foremost in mind when sentencing. And for this purpose the sentence of whipping was sufficient deterrence to reflect the

A seriousness of the offence rather than imprisonment. The unchaste act between consenting parties, and for first time offenders, the punishment of whipping without the need for long term imprisonment would be a sufficient deterrent and effective form of rehabilitation and to some extent would be
B seen as retributory punishment to heal the unseen wounds of the victim, their family, as well as the public sentiments for harsh punishment for perpetrators of the sin. (para 24)

(6) Public interest demands that severe punishment must be
C meted out for violent crimes and sexual offences of moral nature like that of incest. It would also be in the interest of the public to ensure there is fair prosecution and just sentence is met out. For, upon sentencing, the impact also affects the innocent family of the offender in various ways
D inclusive of income of the accused and the upbringing of the family. When it comes to mitigating factors, local factors must also be taken into account. The fact that the appellant was a native and the literacy level may be absent may require some level of consideration. Some of these factors may be
E unique to Malaysia as it is a multi racial, multi cultural and multi religious society with various standards of moral probity which may not be uniform. The plight of the family of the offender in the right perspective must not be totally forgotten more so when the offence was not violent in nature. Trial
F courts must keep an open mind as they have wide discretion to deal with sentences provided it was done within the accepted judicial norms. (para 25)

(7) Failure to consider all the principles in totality and only
G consideration of public interest to mete out the harshest punishment alone would only amount to an expression of emotion alienating the decision from legal jurisprudence and judicial consideration. In consequence, the sentence would not be according to law. Further, the legislative intention so
H far in respect of sentencing has been fair and equitable taking into account the gravity and seriousness of the offence and its affect on the public. (para 25)

(8) The provisions of section 71 of the Penal Code, s. 102 of the SCA 1948, s. 171 and s. 171A of the CPC are there
I to ensure in all practicality that the sentence does not exceed the offender's natural life. Any sentence imposed by

the courts must be one which the accused in the ordinary course could be blessed with the age to serve the rigorous imprisonment for the order of court must not become academic after having gone through judicial scrutiny. The prosecution and the trial court in the interest of justice as a whole must give serious considerations and consider various options available in charging as well as sentencing and must not act in an injudicious manner when deciding the liberty and fate of the subject. (para 25)

(9) In this case, the sentence was excessive as 30 years imprisonment for non-violent offence of singular nature and the prosecution preferring three charges on one crime of incest and opposing the sentence to run concurrently was not a correct exercise of discretion. (para 25)

(10) The appellant is a native 'Bidayuh' (the native of Sarawak referred to as Land Dayak). The appellant had an incestuous relationship with the stepdaughter who was likened to be his own daughter and a prohibited degree for marriage under his own customary law. He came before the court without any shame or remorse. He even said that the victim, aged 17, who was supposed to be in his custody, care and control, consented. This was an abhorrent, despicable and dastardly crime; and it must be given the statutory maximum in terms of imprisonment as well as whipping with the usual reduction for plea of guilt. (para 26)

(11) The accused had committed a grave and serious offence warranting a maximum punishment under the law. He was a first offender and came from native community and had pleaded guilty. It was appropriate at least to give a discount of one third, *inter alia*, to reflect that justice must be tempered with mercy and take into consideration that the appellant had saved the trial court's time. The accused had only committed one crime of incest though various charges had been preferred and the aggregate sentence if any must not exceed the statutory maximum as set out in s. 376B of the Penal Code. The accused is a person reaching the advanced age and long term imprisonment may exceed his natural life. To arrive at a just sentence according to law,

this court was compelled to exercise both the appellate as well as revisionary powers with the object of imposing a sentence not exceeding the statutory maximum stated in s. 376B of the Penal Code. (para 27)

(12) This court ordered that the appellant be sentenced 13 years and three months imprisonment and a whipping of five strokes for each offence. The sentence of imprisonment to run concurrently and to take effect from the date of arrest. (para 27)

[Order accordingly.]

Case(s) referred to:
Ahmad Hassan v. PP [1958] 1 MLJ 186 ***(refd)***
Ahmad Hj Bakar v. PP [1988] 2 MLJ 216 ***(refd)***
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(refd)***
Banwarilal v. Union of India [1963] AIR 1621 ***(refd)***
Bhandulananda Jayatilake v. PP [1982] 1 MLJ 83 ***(refd)***
Jayasankara v. PP [1983] 1 CLJ 171; [1983] CLJ (Rep) 182 ***(refd)***
Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 ***(refd)***
Long Samat & Ors v. PP [1974] 2 MLJ 152 ***(refd)***
Mohamad Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
Peter Tham Wing Fai v. PP [1988] 2 MLJ 424 ***(foll)***
Pitting Hj Mohamed Ali v. PP [1979] 2 MLJ 136 ***(refd)***
PP v. Alfred Vincent [2004] 6 CLJ 515 HC ***(foll)***
PP v. Jafar Daud [1981] 1 MLJ 315 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Ravindran & Ors [1993] 1 MLJ 45 ***(refd)***
PP v. Tan Tho Kim & Ors [1978] 2 MLJ 65 ***(refd)***
PP v. Yap Huat Heng [1986] 1 CLJ 81; [1986] CLJ (Rep) 645 HC ***(refd)***
Queen [1981] 3 Cr App R (s) 245 ***(refd)***
R v. Lawrence & Ors [1980] 32 ALR 72 ***(refd)***
R v. Sargeant [1974] 60 Cr App R 74 ***(refd)***
R v. Smedley [1981] 3 Cr App R (s) ***(refd)***
Raja Izzudin Shah v. PP [1979] 1 MLJ 270 ***(refd)***
RV Ball [1951] 35 Cr App R 164 ***(refd)***
Sheikh Hassan Sheikh Ibrahim v. PP [1940] MLJ Rep 54 ***(foll)***
Tan Bok Yang v. PP [1972] 1 MLJ 214 ***(refd)***
Wan Azman Atan lwn. PP [2006] 7 CLJ 281 HC ***(refd)***
Zeng Guoyuan v. PP [1997] 3 SLR 883 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 163, 164, 171, 171A, 282(d), 307(6), Chapter XXVII
Penal Code, ss. 71, 376A, 376B
Subordinate Courts Act 1948, ss. 71, 102

Other source(s) referred to:
Christopher J Emmins, *A practical approach to criminal procedure,* 3rd edn, p 271
Dr Sir Hari Singh Gour, *The Penal Code of India,* 9th edn, p 53
Mallal's Criminal Procedure Code, 3rd edn, p 198
Sentencing Practice in the Subordinate Courts, 1st edn, pp 54, 55
Smith and Hogan, *Criminal Law,* 5th edn, p 5

Appellant in person
For the respondent - Musli Ab Hamid DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan JC:

[1] This is my judgment in respect of the appellant's (a native of Sarawak) appeal against the sentence.

[2] The appellant was charged with the offence of incest under the new provision of the Penal Code s. 376A which came into force from 27 September 2001. The section reads as follows:

> A person is said to commit incest if he or she has sexual intercourse with another person whose relationship to him or her is such that he or she is not permitted, under the law, religion, custom or usage applicable to him or her, to marry that other person.

[3] The section does not give a comprehensive definition of incest. However, it limits the offence of incest to cases where sexual intercourse has taken place between persons who are prohibited from marrying each other under their law, religion, custom or usage.

[4] The appellant was charged in the sessions court for three separate offences of incest relating to the same person (emphasis is mine) and the victim was only 17 years old. The amended charge reads as follows:

(i) Amended 1st Charge

That you, sometime in early February 2005 at about 5am at house No. 41, kampong Bogag, in the district of Bau, in the State of Sarawak, Malaysia committed incest rape on one Angeli Anak Leken (F) aged 17 years old, who is your step daughter and you thereby committed an offence punishable under s. 376B of Penal Code.

(ii) Amended 2nd Charge

That you, sometime in middle of March 2005 at about 5am at house No. 41, kampong Bogag, in the district of Bau, in the State of Sarawak, Malaysia committed incest rape on one Angeli Anak Leken (F) aged 17 years old, who is your step daughter and you thereby committed an offence punishable under s. 376B of Penal Code.

(iii) Amended 3rd Charge

That you, sometime in middle of April 2005 at about 5am at house No. 41, kampong Bogag, in the district of Bau, in the State of Sarawak, Malaysia committed incest rape on one Angeli Anak Leken (F) aged 17 years old, who is your step daughter and you thereby committed an offence punishable under s. 376B of Penal Code.

[5] The appellant pleaded guilty to all the three amended charges. He was sentenced to 10 years imprisonment and a whipping of three strokes for each offence with an order for the sentence to run consecutively.

[6] The appellant has filed a statutory notice of appeal and petition of appeal. He was not represented here and the court below. The petition of appeal reads as follows:

1. Untuk pengetahuan Yang Arif, saya mempunyai tanggungan terhadap anak-anak saya yang masih kecil, sebab saya adalah ketua dalam keluarga dan saya orang yang susah. Sekarang saya berumur 40 tahun semasa pembebasan saya nanti umur saya sudah menjangkau 70 tahun. Ketika itu saya rasa tidak mampu lagi untuk saya melakukan apa-apa pekerjaan.

2. Untuk pengetahuan Yang Arif juga, saya memohon dari Yang Arif supaya hukuman keatas saya dijalankan berkuat kuasa dari tarikh saya ditangkap serta memohon jasa baik pihak Mahkamah agar dapat meringankan hukuman saya ini.

3. Dengan ini sekali lagi saya Yang Arif, memohon jasa baik pihak Mahkamah agar dapat mempertimbangkan permohonan saya agar hukuman saya dapat diringankan dan berjalan serentak. Di sini saya berjanji tidak akan mengulangi kesalahan ini lagi.

[7] The gist of the contents of the petition of appeal is one of mitigation and does not set out the definite particulars of the points of law or fact in regard to which the trial court is alleged to have erred. This is in breach of s. 307(6) of the CPC which reads as follows:

(6) Every petition of appeal shall state shortly the substance of the judgment appealed against and shall contain definite particulars of the points of law or of fact in regard to which the Court appealed from is alleged to have erred.

[8] Courts have taken strict and liberal approach in interpreting various provisions of s. 307 according to the justice of the case garnered from various cases, to mention a few are as follows: (i) *Pitting bin Haji Mohamed Ali v. PP* [1979] 2 MLJ 136; *Jayasankara v. PP* [1983] 1 CLJ 171; [1983] CLJ (Rep) 182 (iii) *PP v. Tan Tho Kim and 3 Ors* [1978] 2 MLJ 65. I will not deal with this issue as the learned DPP has not taken any objections as to the contents of the petition for good reasons, *inter alia*, that the accused is not legally represented. I commend him for doing so. In ordinary circumstances, if the accused is represented, I would have required strict compliance of s. 307(6) of the CPC. In any event, I would not have dismissed the appeal for non-compliance of a mandatory procedural requirement of the section but would have given the appellant the opportunity to amend the petition of appeal without the need to take the drastic step of dismissing the appeal.

[9] In the circumstance of the case as the appellant is not legally represented, I will accept the petition of appeal in its original form and hold that the issue of law is related to s. 102 of the Subordinate Courts Act 1948 (SCA 1948), which deals with the manner **distinct offences** (emphasis is mine) in respect of sentencing must be dealt with and in respect of the facts whether the correct sentencing principles have been considered before the appellant was sentenced. Section 102 of the SCA 1948 reads as follows:

A When a person is convicted at one trial of any two or more distinct offences a Magistrates' Court may sentence him for those offences to the several punishments prescribed therefor which the court is competent to inflict, the punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, or to run concurrently B if the court shall so direct, but it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of one single offence, to send the offender for trial before a higher court:

C

Provided that:

(a) in no case shall the person be sentenced to periods of imprisonment amounting in the aggregate to more than twenty years;

D

(b) the aggregate punishment shall not exceed twice the amount of punishment which the court in the exercise of its ordinary jurisdiction is competent to inflict; and

(c) when imprisonment is directed in default of payment of a E fine or of costs or compensation ordered under the authority of any law for the time being in force, the imprisonment shall be consecutive to any other term of imprisonment so directed and to any sentence of imprisonment otherwise imposed.

F **[10]** Before me, the appellant stands, and through an interpreter said as follows:

I was charged with three offences under the above section. I was sentenced to 10 years of imprisonment and 3 strokes of whipping G for each charge. The sentence was to run consecutively. I am now 41 years old and at time of sentencing I was 39 years old. I pray the sentence to be reduced and to run concurrently, as I am married with 4 children ranging from the age of 3 to 18 years old. My wife is not working. If I serve the 30 years imprisonment, I will be 70 years old. At the time I will not be H able to support my family any more. This is my first offence and I have no previous conviction. Since my family is poor and my family members have not come to visit me in prison.

I

Further, he said that he did not force the victim but it was done by consent and the police report was lodged by the victim's teacher. A copy of the police report was not tendered in the court below. The learned DPP informs me that the incest was not consensual according to the facts of the case and referred to me the amended facts of the case which were tendered before the trial court which read as follows:

Fakta Kes

Pada 18.8.05 jam lebih kurang 10.00 pagi pengadu Angelia ak Leken (P) 17 tahun beralamat Kampung Bogag, Bau telah membuat laporan mengatakan bahawa bapa tirinya telah memaksanya melakukan hubungan seks pada awal bulan Februari hingga pertengahan bulan April 2005 di rumahnya Kampung Bagog (sic), Bau. Akibat dari perbuatan tersebut pengadu telah mengandung.

Bertindak atas kes ini pada 18.8.05 jam kira-kira 7.15 petang, sepasukan polis yang diketuai oleh Kpl. Martin telah Berjaya menangkap seorang saspek yang disyaki terlibat dalam kes ini dikenali Leken @ Delem ak Gerik (L) Kpt: 660517-13-5543, beralamat Kampung Bogog (sic), Bau.

Hasil siasatan, mendapati pengadu mengatakan tertuduh ~~memaksanya untuk~~ telah melakukan hubungan seks dengannya banyak kali hingga menyebabkannya mengandung. Hubungan seks dilakukan di tingkat atas dalam bilik pengadu di rumah No. 41, kampong Bagog (sic), Bau. Tertuduh telah melakukan hubungan seks dengan pengadu pada awal (sic) bulan Februari 2005 jam lebih kurang 5.00 pagi, pada pertengahan bulan Mac 2005 jam kira-kira 5.00 pagi dan pada pertengahan bulan April 2005 jam lebih kurang 5.00 pagi. Kesemua kejadian ini berlaku di dalam rumah pengadu No. 41 kampung Bagog (sic), Bau.

Hasil pemeriksaan doktor Narisa bt Sulaiman mengesahkan ada berlaku 'sexual intercourse' dan mangsa disahkan mengandung 24 minggu. ~~Siasatan juga mendapati tertuduh telah memaksa pengadu dan diugut tidak memberi perbelanjaan sekolah sekiranya tidak mengikut kemahuan tertuduh~~. Pengadu dalam kes ini telah pun melahirkan anak berpunca dari kejadian ini.

Oleh yang demikian tertuduh (sic) telah didapati bersalah sebanyak tiga kali melakukan kesalahan rogol sumbang mahram dan boleh dihukum di bawah seksyen 376B Kanun Keseksaan.

I take the view that the manner the facts were presented to the trial court was sufficiently prejudicial to the appellant as the previous purported facts before amendment are clearly visible and in the ordinary course of event it would have influenced the learned sessions judge to impose a severe sentence when those facts should not have been taken into account. Such a practice, in my view, is an impediment to fair prosecution and sentencing. The prosecution should be careful in presenting highly prejudicial facts to the determent of the accused, more so when he is not represented unless it is permissible under the law.

I enquired why the appellant was not charged for rape. The learned DPP informs me that the charge of rape attracts a lesser sentence of minimum of five years imprisonment only as opposed to incest which attracts a minimum sentence of six years imprisonment. I am of the view that any prosecution in breach of specific provisions for specific crimes does not support legislative intention and is a wrong exercise of discretion to charge the accused for incest when the prosecution says that there was evidence for rape. For rape is a violent crime as opposed to incest and the sentencing principle will differ, for reasons which will be adumbrated later in my decision. The courts can do very little to correct the miscarriage of justice to the victim as one must appreciate that it would have been painful for the victim to bear the stigma that she had consented to unchaste act when she was a victim of rape. As this issue is not before me, I am not able to act on it. Further, the court can do very little to correct the miscarriage as it is accepted that the Federal Constitution gives very wide powers to the prosecution and it is for them to act within the letters and spirit of the federal constitution and various other statutory provisions. In *Long bin Samat & Ors. v. Public Prosecutor* [1974] 2 MLJ 152, the Federal Court stated that:

> … On independence the Federal Constitution came into force, and clause (3) of its Article 145 (as amended) provides:
>
> > The Attorney-General shall have power exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial.
>
> In our view, this clause from the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also

discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhorne's speech at pages 32-3 in *Smedleys Ltd v. Breed* [1974] 2 All ER 21). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.

...

... Having the control and direction of criminal prosecution and proceedings given to him by section 376(i) of the Criminal Procedure Code the Public Prosecutor has a duty to conduct prosecutions in the best interests of justice ... . (emphasis added)

It must be stated here that subject to the last paragraph above the right to prosecute in any manner the prosecution thinks fit vest with the prosecution, to balance it parliament has left the powers of sentencing with the court and in this process court can take proactive steps to check any form of accesses.

[11] The respondent objected to the appeal and;

(i) the learned DPP says that the charges in this case are separate and distinct offences and the sentences must be consecutive and not concurrent and refers to the cases of *Bachik bin Abdul Rahman v. Public Prosecutor* [2004] 2 CLJ 572; *Public Prosecutor v. Yap Huat Heng* [1986] 1 CLJ 81; [1986] CLJ (Rep) 645, *Wan Azman Atan lwn. PP* [2006] 7 CLJ 281. I specifically asked the learned DPP whether the courts have deliberated on s. 102 of SCA 1948 in these cases. The answer was in the negative. Further, I enquired whether by these decisions, the discretion given to the trial sessions judge to order a concurrent sentence by parliament according to the justice of the case under the section has been made otiose. The learned DPP assures me that these cases set out the guiding principles only. I take the view that the decisions of the appellate courts are strictly binding and must be followed. However, where the courts have not interpreted a specific statutory provision dealing with the subject matter in issue, the trial court has the discretion to depart from the guiding principles, provided the justice of the case demands it and the grounds for departing are clearly set out in the judgment.

(ii) The learned DPP says that the trial court has taken judicial notice of the rampancy of the offence and it is in the public interest that a severe sentence must be met out and refers to me the grounds of judgment of the trial court. I do not think the trial court was correct in the decision to take judicial notice of the rampancy of rape when the charge was for incest. The grounds for passing sentence are now reproduced and read as follows:

> The accused is convicted on three charges under s. 376B of the Penal Code on his plea of guilt. Section 376B of the Penal Code provides that the convicted offender shall be punished with imprisonment for a term of not less than six years and not more than twenty years, and shall also be liable to whipping. The court has taken judicial notice from the number of rape cases registered in the Sessions Court in Kuching and from the reports in our national and local newspapers that incest rape is rampant. Indeed, it has got to an alarming stage that the Parliament, in an attempt to curb this hideous crime and to reflect its serious view towards it, amended the Penal Code in Year 2001 by making incest rape a distinct offence from rape and increasing the mandatory imprisonment to six years.
>
> The facts of the case reveal that the accused is a stepfather to the complainant who was 17 years old and school going at the time of the offence. He ravished her on three occasions over a period of three months starting from February 2005 until April 2005. I have no doubt that he would have continued this hideous act if she had not become pregnant. There is absolutely no reason for the accused to do such a horrible thing to the victim, even though she is his step daughter. Instead of taking care of her, he defiled her innocence and made her pregnant at an age when she should be carefree.
>
> The accused told the court that he felt sorry for what he had done and he has demonstrated his remorse by owing up readily. While a plea of guilt will generally entitle an accused to some discount in sentencing, however, having considered the serious nature of the offence, I will accord minimal discount even though his plea of guilt has undoubtedly saved the time of the court and the inconveniences of witness.

The accused pleaded to the court to pass a concurrent sentence, which I regret I do not agree. This is because the three counts of offence though similar in nature were committed on separate occasions. Also, there are no extenuating circumstances whatsoever to justify it.

The accused requested in his mitigation to be separated from other prisoners due to constant bully from them. I would request the Officer in Charge of Prison to look into the matter and recommend it, if the allegation is true.

Having considered the nature of the offence committed, the plea of guilt, his mitigation, his antecedent, in the public interest I sentence the accused to ten years imprisonment and a whipping of three strokes for each offence. The imprisonment sentences are to run consecutively.

[12] At the first instance, for the purpose of sentencing, I take the view that I need to deal with the issue whether incest must be treated as a single crime committed over a period of time or whether the prosecution can separate the act of incest during a period of time into several and distinct offences, (subject to s. 164 of the CPC) and claim they are separate and distinct offences and insist that the sentencing must be consecutive and not concurrent.

[13] In this case, the appellant having pleaded guilty has admitted to incestuous relationship with his step-daughter. Incest, according to the definition in The Shorter Oxford English Dictionary, defines incest as an impure and unchaste act. It further interprets it as a crime of sexual intercourse or cohabitation between persons related in such degree within which marriage is prohibited by law. I have understood incest in the ordinary sense to mean any form of sexual relationship (not necessarily sexual intercourse) between prohibitory degrees to marriage by religion, custom or usage which is not permissible and is an unchaste act. Now pursuant to the new provision, s. 376A of the Penal Code, it has become an offence.

[14] Section 376A gives a limited meaning to the definition of incest. Under s. 376A, for incest to be an offence it necessarily requires parties to have performed sexual intercourse and does not deal with any form of other sexual overacts within persons who are prohibited from marrying each other under the law, religion, custom or usage. Thus, s. 376A does not cover all form of incestuous relationship and is limited to one where sexual

intercourse has actually taken place and parliament has made it an offence to have sexual intercourse within the prohibited degrees. The section itself does not mention whether the conduct of incest must be taken as one offence or whether a person can be charged for each and every penetration in the act of sexual intercourse under the pretext that each penetration is a separate and distinct offence. For this purpose we need to consider what amounts to distinct and separate offence under the law and the most relevant provision in the Penal Code are ss. 71 and 102 of the SCA 1948, and other provisions of the CPC in particular ss. 163 and 164.

[15] Learned authors of *Mallal's Criminal Procedure Code*, 3rd edn at p. 198 have made an attempt to define distinct offences:

> When two offences are committed and they have no connection with one another, they are distinct offences. The following offences have been held by the Indian Courts to be distinct offences:
>
> (1) Ss. 380 and 411 of the Penal Code. See *Kalal v. Pal*, I.L.R. 28 Cal. 10 ;
>
> (2) Ss. 167 and 466 of the Penal Code. See *R. v. Kur,* I.L.R. 8 Cal. 450;
>
> (3) Ss. 411 and 413 of the Penal Code. See *R. v. Koondoo,* I.L.R. 8 Cal. 634;
>
> (4) Ss. 411 and 480 of the Penal Code. See 6 C.W.N. 550;
>
> (5) Ss. 372 and 373 of the Penal Code. See *R. v. Ramana and Ors*., I.L.R. 12 Mad. 273;
>
> (6) Ss. 408 and 467 of the Penal Code. See *R. v. Lal*, I.L.R. 32 All. 219; *R. v. Viswanathan*, I.L.R. 30 Mad. 328;
>
> (7) Ss. 409 and 477A of the Penal Code. See *R. v. Viswanathan, ibid.*
>
> (8) Ss. 319 and 359 of the Penal Code. See *R. v. Chekutty and Ors.*, I.L.R. 26 Mad. 454; see also *R. v. Karmakar*, I.L.R. 50 Cal. 94.
>
> (9) Ss. 182 and 500 of the Penal Code. See *Lal v. Singh,* I.L.R. 37 Cal. 604.

(10)-(1) Abetting the falsification of a document; (2) fraudulently destroying and secreting documents; and (3) abetting criminal breach of trust. *R. v. Pillai*, I.L.R. 26 Mad. 125.

(11) Accused withdrawing money on two different dates by forged withdrawal cheques – two charges are necessary. *Prasad v. R.*, A.I.R. 1933 Pat. 488

In all the examples the learned authors of *Mallal's Criminal Procedure Code* have cited, I can see one fine distinction that is that the elements of the offence are different from the other which obtains distinct character. The most favourable construction (for the appellant) of the term "distinct offence" or "distinct offences" as stated in s. 163 of the Code or s. 102 of SCA 1948 must be truly a separate and distinct offence. For example, kidnapping and rape of the same victim is clearly a distinct and separate offence. However, in a case of rape, to argue that every penetration amount to sexual intercourse and in consequence is a separate offence in my view will not accord with the intention of parliament in respect of conviction as well as sentence. More so where the illustrations (a) to s. 71 of the Penal Code states:

ILLUSTRATIONS

(a) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

In *Zeng Guoyuan @ Chan Hock Seng v. PP* [1997] 3 SLR 883, the High Court of Singapore in dealing with their s. 71 of the Penal Code which is *pari materia* to our section observed:

In my view, a reading of the relevant sections of the CPC and the Penal Code as well as the existing case law shows that the correct approach to ascertaining the applicability of s. 71(1) is to distinguish between two situations. The first is where separate offences arise out of one transaction. The second is where the entire transaction is in reality one offence, or to use the terminology of the *Tham Wing Fai Peter v. PP* case, one 'composite offence'. Where there are separate offences, separate sentences may be ordered for each, the question being only whether such sentences ought to be concurrent or consecutive and whether s. 18 of the CPC is applicable. Where all the acts complained of are component parts of but one offence or are so

A closely connected that it cannot be fairly said that more than one offence has been committed, s. 71(1) of the Penal Code is relevant. Whether several charges fall within one situation or the other must be one of fact, depending on the peculiar circumstances of each case.

B **[16]** In my view, as a general rule for offences to be distinct and separate, it must not be inextricably interwoven with the victim as well as to the elements of the offence. Support for my view can be garnered from various cases, discussed below.

C (a) In *Sheikh Hassan bin Sheikh Ibrahim v. Public Prosecutor* [1940] MLJ Rep 54, the appellant was charged with criminal breach of trust in respect of RM23 paid to him on 23 separate occasions within the space of a year. The second charge alleged that with intent to defraud he committed falsifications D of accounts by wilfully omitting to enter the twenty-three payments in his cash book, and later a third charge was added in. The appellant was convicted on the first charge and acquitted on the other two. The court, *inter alia*, stated that the criminal breach of trust charged was one offence though E made up of twenty-three items and that when the falsifications charged were confined to those items, the criminal breach of trust and the falsification were so closely inter-related that the twenty-three falsifications became a single offence like the twenty-three breaches of trust which formed a single offence F and that the falsifications were related to the criminal breach of trust items by community of purpose and they stood to one another in the relationship of cause and effect.

(b) In *Peter Tham Wing Fai v. Public Prosecutor* [1988] 2 MLJ 424, G the appellant pleaded guilty to 36 charges of forging documents. He was sentenced to four years' imprisonment on each of the 36 charges, to run concurrently except sentences on two of the charges to be served consecutively. Effectively, the appellant has to serve a total of eight years' imprisonment. H The appellant contended that the offences were all part of a single transaction and were not distinct offences for the purpose of sentencing. The appellant also appealed against the sentences imposed. The court, *inter alia*, stated that "distinct" means not identical. *The court asserted that the offences which were* I *not inter-related would be distinct, but inter-related offences could also be distinct; it would depend upon the circumstances whether there was only one transaction and one offence committed. Further, the court*

stated that a series of offences of the same or a similar character could also be distinct, as could offences committed in the same transaction (emphasis added).

(c) In *Banwarilal v. Union of India* [1963] AIR 1621 the Indian Supreme Court at p. 1621 in defining distinct offence stated as follows:

> 'Distinct' means 'not identical'. It stresses characteristics that distinguish while the word 'separate' would stress the 'two things not being the same'. Two offences would be distinct if they be not in any way inter-related. If there be some inter-relation, there would be no distinctness and it would depend on the circumstances of the case in which the offences were committed whether there be separate charges for those offences or not.

[17] For effective, meaningful and just administration of criminal justice, it requires great conviction and commitment on the part of the prosecution to ensure that the offender is not charged for several offences of the same kind on the same victim as far as possible and necessary; therefore trial court must as far as practicable see to it that the sentence does not exceed the statutory maximum imposed by parliament on the said offence even though the prosecution has preferred several charges of the same kind and on the same victim with a view of securing a severe sentence in aggregate. In fact, in such cases the court must consider a concurrent sentence as opposed to a consecutive one as provided for in s. 102 of the Subordinate Courts Act 1948.

[18] Having considered the above cases with regard to the meaning of the definition of "distinct offence and offences", I have my reservation as to whether on the facts of the case, the offence of incest must be treated as one single crime or the prosecution was right in preferring three separate charges. I do not propose to make a decision on this issue in this case as I have not had the benefit of hearing the full argument by the prosecution as well as the appellant as the appellant is not represented. However, I am of the view that in consequence of my observations stated above, interest of justice will be better served if I consider that incest on the facts of this case is a single crime for purpose of sentencing only. I do not intend to impose to a first offender a sentence more than that prescribed in s. 376B of the Penal Code. The discretion, as to sentencing of the offender, vest entirely with

A the court. This point is eloquently articulated by Hashim Yeop A Sani J (as he then was) in *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256 where His Lordship observed:

> In respect of sentencing there can be only general guidelines. No
> B two cases can have exactly the same facts to the minutest detail. Facts do differ from case to case and ultimately each case has to be decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to
> C permissible variations.
>
> The principles to be applied in imposing sentence however are the same in every case. The High Court sitting in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly
> D inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence.
> E It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence.

[19] I am also mindful of the fact of the similar observation of Raja Azlan Shah Ag LP (as HRH then was) in *Bhandulananda Jayatilake v. Public Prosecutor* [1982] 1 MLJ 83 where it was stated
F that:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence
> G so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing
> H opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v. Jamieson* [1952] AC 525, 549). It is for that reason that some
> I very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally

> conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, *per se*, to warrant this court's interference.

[20] After having studied the grounds for passing the sentence in this case, I am satisfied that there was failure on the part of the trial court to apply the right sentencing principles and much reliance is based on public interest without any consideration to the other norms relating to sentencing. I must emphasise that public interest, though an important consideration in itself, cannot be the sole criteria in assessing sentence; there are other considerations which must be dealt with before the sentence can be said to have been passed according to law. In *PP v. Jafar bin Daud* [1981] 1 MLJ 315 Mohamed Azmi J (as he then was) asserted that a sentence according to law means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles.

Sentencing the offender is an important responsibility entrusted by parliament to the court. In fact, once the court finds an accused guilty it is incumbent of the court to spend sufficient time to consider what should be the appropriate sentence. It is one of the most difficult decisions to make and the court should not apply its mind in hasty and injudicious manner or under any form of pressure.

[21] Almost all decisions relating to principles of sentencing adumbrated by the courts stand only as a guide and the appellate courts have never attempted to bind the trial court or whittle down their discretion in sentencing provided the trial court can justify the grounds for doing so where the sentence does not accord with the general guidelines set out by the appellate courts. The learned author Christopher J. Emmins in his book *"A practical approach to criminal procedure 3rd Edition"* at p. 271 says:

> It should, however, be emphasized that precedent plays a relatively small part in sentencing. This is for three reasons. First, the truism that every case turns upon its own facts is never truer than in the context of sentencing. No two offenders and no two offences are ever precisely the same, whatever the similarities between them. Therefore, if told about a Court of Appeal decision in a comparable case, a judge can always find a reason for distinguishing it if he so chooses.

[22] Subordinate courts must familarise themselves with sentencing principles and policies in the right perspective and apply it to the facts of the case to reach a just result according to law. For this purpose it is important to understand and appreciate the aims of sentencing.

(a) The aims of sentencing, in brief can be conveniently discussed under three captions namely retribution, deterrence and rehabilitation. However, jurist and judges have discussed the principles in more than 4 captions. For example, in *R v. Sargeant* [1974] 60 Cr. App R 74 Lawton LJ took the view that the classical principle relating to sentencing can be summed up in four words: retribution, deterrence, prevention and rehabilitation. Further, His Lordship asserted that any judge who comes to sentence ought always to have these four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing. In *Mohamad Abdullah Ang Swee Kang v. Public Prosecutor* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209, the Supreme Court reiterated the above principles and stated:

> Although the classical principles applicable to all sentences were summed up in *Reg v. Sargeant* [1974] 60 Cr App R 74 as retribution, deterrence, prevention and rehabilitation, in view of the prevalence of criminal breach of trust cases at the present time, we agreed to adopt the argument of Lawton LJ in *Reg v. Davies* [1978] 67 Cr App R 207 and accordingly we held that in this particular case only the elements of retribution and deterrence needed to be considered.

(b) The former President of the Malaysian Bar, Mr. Mah Weng Kwai in his paper under the caption "Sentencing Principles – Judicial Discretion and Mandatory Sentences" presented at 12th Commonwealth Law Conference at Kuala Lumpur in September 1999 has summarised the salient principles of sentencing presently in vogue and says as follows:

> Sentencing principles are general principles which the sentencer ought to have in mind when he delivers a particular sentence. The principles considered by the sentencer depend very much on the aim sought to be achieved by the imposition of a sentence.
>
> There are five main aims of sentencing – deterrence, rehabilitation, prevention, retribution and just deserts. It may be helpful here to state briefly what they are. The first three are popularly considered to be utilitarian aims:
>
> (i) Deterrence - A deterrent sentence aims both to deter the individual offender from committing offences in the future and to deter potential offenders from committing crime.
>
> (ii) Rehabilitation - A rehabilitative sentence seeks to reform an offender from being a criminal to being an honest and responsible member of society.
>
> (iii) Prevention - A preventive sentence is naturally an incapacitative sentence as it aims to directly prevent the offender from committing further crimes against other members of society.
>
> (iv) Retribution - Retribution demands that the sentence imposed reflects the degree of revulsion which society feels towards the conduct of the offender.
>
> (v) Just Deserts - The concept of giving an offender his just deserts stipulates that the severity of the sentence should be proportionate to the seriousness of the crime and that similar offences should receive similar sentences.
>
> It has been noted that sentences in Malaysia reflect a combination of several or all of the above aims. Results of research conducted between 1992 and 1994 indicate that there is no consensus amongst sentencers in Malaysia as to which aim of sentencing should take precedence over another.

(c) In *R v. Sargeant, supra*, it was stated that while the concept of an eye for an eye has no place in sentencing practice, an important aspect of retribution is that society, through the courts, must show its abhorrence of particular types of crime, and the only way the courts can show this is by the sentences they pass. The learned authors of *Halsbury's Law of England* (4th edn.) take the view that retributive element is intended to show public revulsion for the offence and to punish the offender for his wrong conduct.

(d) Deterrence sentence is aimed not only to deter the accused from committing the offence in future but also to deter other people from committing the offence. The first is referred to as specific deterrence and the latter as general deterrence. In *Ahmad bin Haji Bakar v. PP* [1988] 2 MLJ 216, it was stated that public interest does require that a sentence of imprisonment, sufficient to deter not only the accused but other persons of a like mind, must be imposed. The aim of rehabilitation is to ensure that an opportunity is given to the accused in circumstances where the court is of the view that he needs the help and support to change into a law abiding person. In *R v. Smedley* [1981] 3 Cr App R (s) *the court asserted that a short sentence of imprisonment in respect of some prisoners is a sufficient measure of disapproval of what has been done and a suitable means of bringing that person to his or her senses* (emphasise added)

(e) The sentencing policy of the courts is aptly described by Hilbery J in *RV Ball* [1951] 35 Cr App R 164 as follows:

> In deciding the appropriate sentence, a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence passed in public, serves the public interest in two ways. … The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, …

(f) It is necessary and essential to take note that Hashim Yeop A Sani J (as he then was) in *Raja Izzudin Shah v. Public Prosecutor* [1979] 1 MLJ 270 has asserted that the primary purpose of sentencing is for the purpose of reformation of the

offender, to that I will add that public interest is an overriding consideration which must be taken to be paramount in nature and should not be viewed as the only consideration. Similar sentiments have been expressed in different ways for example in *Tan Bok Yang v. Public Prosecutor* [1972] 1 MLJ 214. Sharma J took the view that:

> I am quite aware that the law does provide for a lesser sentence or no sentence at all imposed upon persons of young age. There has, however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the dare, dash and defiance of the youth alone is capable of performing and producing. Law cannot, in my view, remain merely a static and a meaninglessly passive, if ornamental and an orthodox instrument of justice, ineffective in its results and application. The social needs of the times have to be met and effectively met. It is not merely the correction of the offender which is the prime object of punishment. The considerations of public interest have also to be borne in mind. In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society.

(g) Before imposing sentence, the court must take into consideration the following factors namely: (a) the gravity or severity of facts constituting the offence; (b) the circumstances in which it was committed; (c) the rampancy of such offence in the area, (d) the offender's previous record; (e) the offender's contribution and support to his family members; (f) the offender's means; (g) the effect of conviction and sentence on his job opportunities; (h) the age and health of the accused; (i) whether it is his first offence; (j) whether the accused had cooperated with the police after the commission of the offence; (k) whether the accused had pleaded guilty; (l) status of the accused; (m) whether there was violence during the crime; (n) public interest etc.

(h) The court must be vigilant in not admitting statements which are prejudicial to the accused where material evidence has not been proven when deciding to impose a more severe sentence. For example in this case the learned sessions judge in her grounds says:

> The court has taken judicial notice from the number of rape cases registered in the Sessions Court in Kuching and from the reports in our national and local newspapers that incest rape is rampant.

There are a number of prejudices in the observations of the learned sessions judge the appellant is made to suffer. First the learned sessions judge says incest rape is rampant. Incest and rape are two entirely different types of offences. Rape is seen to be a crime of violence whereas incest is a crime of passion or obsession, though the act is unchaste and deplorable. Further, incest is between consenting parties and rape is otherwise.

Further, the learned sessions judge says that she has taken judicial notice of the number of rape cases and concludes that incest rape is rampant. In my opinion, it is not the correct approach and support for my view is found in the decision of *Public Prosecutor v. Alfred a/l Vincent* [2004] 6 CLJ 515 where Abdul Hamid bin Embong J (as he then was) on the facts of the case made the following observations:

> Before this court, the learned deputy public prosecutor read out his written submission and submitted that a serious offence had been committed as reflected by the seven-year maximum imprisonment sentence allowed under s. 379 of the Penal Code. He also submitted that the learned magistrate had erred in fact in not taking into consideration the rampancy of the offence. However from the record of appeal, there was no such evidence tendered by the prosecution on whether this type of offence was rampant or not and as such I found that the learned magistrate had not erred in not considering this factor. An attempt by the learned deputy was made before this court to produce some statistics on offences of this nature, but was disallowed by this court because the court held the view that any such statistics should have been produced at the first instance, before the magistrate who passed the sentence.

The learned judge's observation in the above case must be meticulously followed by trial court or great prejudice will be caused to the accused. It is unsafe for the courts on its own volition to accept unproved facts or to accept statements by the prosecution without proper evidence or statistics having been led for purpose of imposing a severe sentence. To put it briefly, courts should not entertain any statements without proof in criminal prosecution. In criminal trials, there must be an absolute element

of fairness to the accused in all aspects, not only within the letters of the law but also in spirit because any form of infringement on the subject's liberty may be seen to be a constitutional violation pursuant to several articles of the federal constitution.

[23] The final stage is for the court to decide the appropriate sentence and for this purpose I refer to the following:

(a) The learned authors of *Halsbury's Law of England* (4th edn.) Vol. II say, in determining the appropriate sentence for any particular offence, the court will take into consideration the nature of the offence and the circumstances in which it was committed. In *Queen* [1981] 3 Cr App R (s) 245, the court took the view that the proper way to look at the matter is to decide a sentence which is appropriate for the offence for which the prisoner is before the court. In *R v. Lawrence & Ors* [1980] 32 ALR 72 the court opines:

> It is well recognized that the fixing by the legislature of a maximum sentence for a particular crime provides a legislative view of the seriousness of the crime in question. A legislative policy so indicated, as with any other legislative policy should guide the court in the determination of the appropriate sentence to be imposed in a particular case. In order to give effect to this policy it will normally be necessary to reserve the maximum for the more serious cases of the crime in question with the less serious cases being dealt with by imposition of a less penalty which pays due regard to the seriousness of the class of crime, so indicated by the legislation. If there is a legislative amendment increasing the maximum sentence, this new view of the seriousness of the crime should be reflected in the sentence imposed.

(b) The learned authors of *"Sentencing Practice in the Subordinate Courts"* 1st edn at pp. 54 to 55 say that:

> Second, the court should have regard to the established common law principle of parsimony. This requires the selection of the least severe sentencing option that will be commensurate with the gravity of the offence and the goal or objective of the punishment. Where the offence carries the option of a fine and involves a first offender, the general approach must always be to consider first if the offence can be dealt with appropriately by way of a financial penalty or some other non-custodial option (eg probation).

Where an imprisonment term will be manifestly excessive punishment, the court ought to impose a fine even if the court is of the view that the maximum fine provided by statute is insufficient to achieve the purpose of deterrence. The maximum quantum of fine is legislated by Parliament and, if the quantum is too low, the proper solution is to have Parliament enact legislation increasing the amount of fines which may be imposed, and not to impose a custodial sentence instead on the accused (*Ngian Chin Boon v. PP* [1999] 1 SLR 119). Thus, only in cases where custody is deemed necessary should a term of imprisonment be imposed.

Whether custody or some other alternative (eg. fine, probation, reformative training) is appropriate has to be decided by having regard to the seriousness of the offence by reference to its statutory punishment, the nature of the offence and the particular circumstances in which it was committed, the offender's role in it, and the prevalence of the offence against the background of the criminal record of the offender.

The onus lies on the prosecution in the first place to assess the seriousness of an accused's conduct and to frame an appropriate charge in the light of the evidence available. Once an accused has pleaded guilty to (or been convicted of) a particular charge, it cannot be open to the court, in sentencing him, to consider the possibility that an alternative – and graver – charge might have been brought and to treat him as though he had been found guilty of the graver charge (*Sim Gek Yong v. PP* [1995] 1 SLR 537).

Third, the punishment must reflect and befit the seriousness of the crime *(PP v. Tan Fook Sum, supra)*. This is essentially the principle of proportionality. In *PP v. Loo Choon Fatt* [1976] 2 MLJ 256, Hashim Yeop A Sani J stated at p 257 that '… the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed or if the sentence appears to defeat the object of the statute'. For example, for criminal breach of trust, all things being equal, the larger the sum misappropriated, the heavier the sentence that should be imposed (*Wong Kai Chuen Philip v. PP* [1991] 1 MLJ 321, *Gopalakrishnan Vanitha v. PP* [1999] 4 SLR 307). Tan Yock Lin, in his book, *Criminal Procedure,* has commented that the principle of proportionality is easy to state but not easy to apply. In some offences, the application of proportionality is largely intuitive. In some cases, its application will appear obvious.

Fourthly, if there are offences to be taken into consideration under s. 178(1) of the Criminal Procedure Code (Cap 68) the effect of taking them into account is that the sentence which the court would otherwise have imposed is increased (see *PP v. Mok Ping Wuen Maurice* [1999] 1 SLR 138, *PP v. N* [1999] 4 SLR 619).

Finally, if there are a multiplicity of offences, regard should be had to the totality principle which requires the court to review the sentence and consider whether the aggregate is just and appropriate to the total criminality (see *Kanagasuntharam v. PP* [1992] 1 SLR 81).

(c) Before the court passes the sentence it must be mindful of the various provisions in Chapter XXVII of the CPC. In particular s. 282(d) which describes the general rule that a sentence of imprisonment shall take effect from the date it was passed unless the court passing the sentence otherwise directs (see *Bachick bin Abdul Rahman v. PP, supra*). Where the accused was not granted bail, it is necessary on the date of the sentence to consider from when the sentence should take effect, failing which the discount rule for sentencing may become illusory and it may not be fair exercise of discretion not to give discounts in deserving cases. In this case there was no evidence in the record of appeal as to when the appellant was arrested and whether he was in remand or on bail. In consequence, I took my own initiative to call for the records available in the court below and found that the date of arrest was not available in any of the documents except the date 1 September 2005, the date the appellant was first produced before the court. The appellant was on remand for nearly a year and was sentenced on 15 August 2006 and the court below did not make any specific orders pursuant to s. 282(d) of the CPC when the sentence ought to commence and in consequence the sentence is deemed to have commenced from the date of sentencing. In normal practice, when the accused is on remand, the sentence is ordered to take effect from the date of arrest. This was not done in this case. No reason was given by the court below. I take the view that the court must judicially consider when the sentence is to commence when the accused was in remand. This is to ensure that the accused gets the benefit of the discount rule as to sentence as well as for the period of remand and to further ensure that the discount rule does not become illusory.

A This consideration must be given even if no discount is given as in this case. For example, in *Public Prosecutor v. Ravindran & Ors* [1993] 1 MLJ 45, the court specifically ordered the sentence to take effect from the date of the arrest. I must assert here that when trial court deals with sentencing, there
B must be conscientious application of law and fact to show all relevant consideration was taken into account before the subject is sentenced. Such a conscientious precision in my view is a constitutional as well as statutory responsibility entrusted on the sentencer and it must be discharged
C according to law.

[24] To my mind, 30 years of imprisonment in aggregate in this case for unchaste act is excessive and 9 strokes on the facts is too low and does not subscribe to legislative intention. My view
D is that in cases where it is not a violent crime and in this case where it is moral in nature the reformative considerations must be foremost in mind when sentencing. And for this purpose the sentence of whipping is sufficient deterrence to reflect the seriousness of the offence rather than imprisonment. My reasons
E are as follows:

(a) Section 376B provides for imprisonment as well as whipping. Whipping is seen to be a form of deterrent as well as rehabilitative sentence and enjoys the status of retributive
F punishment as well. From time immemorial and at least one major religion has made it mandatory for certain grave and serious offences as well as unchaste act without the necessity for imprisonment. Whipping did not find a place in the common law jurisprudence. When the British enacted the
G Indian Penal Code which came into force on 1 January 1862, whipping as a form of sentencing process did not find a paramount place. The learned author of *"The Penal Code of India"* Dr. Sir Hari Singh Gour 9th edn at p. 53 observes:

> Flogging is not included in the list of punishments provided
H by the Code. This punishment was also passed in review by the draftsmen and condemned for the same reason as pillory and donkey-riding on the ground that, to a person in decent station in life, it adds disgrace to the severity which could not be justified except when inflicted upon
I juvenile offenders. The draftsmen, however, admitted that their remarks did not apply to juvenile offenders in whose case that form of sentence is both deterrent as well as unexceptionable. In 1864, a Whipping Act was passed and

> it introduced the sentence of flogging as punishment for certain crimes. This Act was replaced by the Whipping Act 1909 (Act 4 of 1909) which modified the rigour of the old Act and confined the sentence of flogging to old and juvenile offenders only. The Abolition of Whipping Act 1955 (44 of 1955), has abolished whipping and repealed the Whipping Act 1909 (Act 4 of 1909). There was an element of brutality in the sentence of flogging and it was a stain on civilisation. The Indian Parliament has removed this blot disfiguring the Statute Book.

Flogging is slightly different from whipping under our Act. Flogging in India then was done in public whereas whipping under our Act is executed without any access to the public ie, discreetly.

Malaysia to a large extent has adopted the Indian Penal Code in the original form. After independence, Malaysian legislature has taken cognisance of the importance of whipping as opposed to flogging as a form of effective sentence and has introduced it in various forms of violent crime and now for unchaste acts. Old cases in the new development of law are not helpful and in my view must be taken as *obiter* statements only in those circumstances. For, example in *Ahmad bin Hassan v. Public Prosecutor* [1958] 1 MLJ 186, the court opined:

> In our view the sentence of imprisonment was fully justified but the sentence of corporal punishment was not a suitable one and we accordingly quashed so much of the sentence as consisted of an order for corporal punishment.
>
> The offence was a serious one, as is indeed every offence of this sort committed by an adult on a juvenile, and fully merited severe punishment. On the other hand in view of the well-known psychological connection between the giving and the suffering of pain and sexual perversion we are of the opinion that in cases involving sexual perversion flogging is not a suitable punishment.

Whipping has a practical and tactical significance in that even ferocious mammals have been trained by a cane, notwithstanding the fact that it can also be achieved by love and affection. By analogy, in my view unacceptable human conduct in criminal offenders in case of moral offences can sufficiently be arrested by the sentence of whipping. And that appears to be the intention of parliament for rampantly introducing whipping for serious offences. In case of violent offenders, it is necessary to provide in addition to whipping, long term imprisonment to reflect the gravity

and seriousness of the offence and to keep the offenders out of criminal mischief. They must not be released early as they may be an immediate threat to the society. However, in the case of unchaste act between consenting parties, and for the first time offenders, the punishment of whipping without the need for long term imprisonment will be a sufficient deterrent and effective form of rehabilitation and to some extent will be seen as retributory punishment to heal the unseen wounds of the victim, their family, as well as the public sentiments for harsh punishment for perpetrators of the sin.

[25] Public interest demands that severe punishment must be mete out for violent crimes and sexual offences of moral nature like that of incest. It will also be in the interest of public to ensure there is fair prosecution and just sentence is met out. For, upon sentencing, the impact also affects the innocent family of the offender in various ways inclusive of income of the accused if he is the sole bread winner, and the upbringing of the family etc, which I need not elaborate. In my view, when it comes to mitigating factors, the standard imposed in foreign judgments must not be taken to be the yardstick for all maladies. Local factors must be taken into account. In this case, the fact that the appellant is a native and the literacy level may be absent may require some level of consideration. Some of these factors may be unique to Malaysia as it is multi racial, multi cultural and multi religious society with various standards of moral probity which may not be uniform. The plight of the family of the offender, in this case a native, in the right perspective must not be totally forgotten more so when the offence was not violent in nature. Trial courts must keep an open mind as they have wide discretion to deal with sentences provided it is done within the accepted judicial norms. This is the reason why jurist and judges have formulated sentencing principles and polices which need to be adhered to for public interest as a whole. In *Bachik bin Abdul Rahman v. PP*, *supra* Augustine Paul JCA (as he then was) made the following observations:

> It must be remembered that both the offences were executed in the same manner and are of the same severity and are unrelated. It cannot be denied that the cumulative effect of both the sentences will have a crushing effect on the accused bearing in mind his age. But this effect must be balanced against the seriousness of the offences committed by him and the need to

> protect young females from him. The order made by the High Court in upholding the direction of the sessions court on the commencement of the jail term imposed in this case is therefore correct in law and we are unable to interfere.

Failure to consider all the above principles in totality and only consideration of public interest to mete out the harshest punishment alone will only amount to an expression of emotion alienating the decision from legal jurisprudence and judicial consideration. In consequence, the sentence will not be according to law.

Further, I must add that the legislative intention so far in respect of sentencing has been fair and equitable taking into account the gravity and seriousness of the offence and its affect on the public. For the most serious offence death penalty becomes mandatory next being life imprisonment and then sentence for more than 20 years imprisonment and whipping to the extent of statutory maximum of 24 strokes. Often courts exceed this guideline and impose sentence which can exceed the natural life of the offender. The learned authors of Smith and Hogan on *Criminal Law* 5th edn. at p. 5 say:

> The traditional attitude of the common law and of Parliament to crime has, not unnaturally, been reflected in the sentencing practice of the courts. A scale of punishment being provided, varying with the potential moral wickedness of the offence and its danger to society, the court has generally seen its task as one of fitting the penalty to the particular degree of iniquity and dangerousness evinced by the particular defendant. Where there is a statutory maximum, it should be reserved for the worst type of offence which comes before the court and a sentence which does not allow for this is wrong in principle. Judges should not, however, use their imagination to conjure up unlikely worst possible kinds of case.

To ensure that sentences do not exceed statutory maximum even in aggregate as far as possible, parliament has enacted provisions like s. 71 of the Penal Code, s. 102 of the SCA 1948, s. 171 and s. 171A of the CPC and many more provisions to mitigate excessive sentence. In my view, all these provisions are there to ensure in all practicality that the sentence does not exceed the offender's natural life. In this respect, I would say that any sentence imposed by the courts must be one which the accused in the ordinary course can be blessed with the age to serve the

A rigorous imprisonment for the order of court must not become academic after having gone through judicial scrutiny. The prosecution and the trial court in the interest of justice as a whole must give serious considerations and consider various options available in charging as well as sentencing and must not act in an B injudicious manner when deciding the liberty and fate of the subject.

In this case, I say the sentence is excessive as 30 years imprisonment for non-violent offence of singular nature and the C prosecution preferring 3 charges on one crime of incest and opposing the sentence to run concurrently is not correct exercise of discretion.

[26] In this case, proper sentencing principles have not been D taken into account and mitigating factors have not been given proper consideration. I have also taken note of the fact that the appellant is a native "Bidayuh" (the native of Sarawak referred to as Land Dayak). Under his customary law, which is partly codified pursuant to The Native Customary Laws Ordinance, The Adat E Bidayuh Order, 1994 published in the Sarawak Government Gazette Part II on 26 May 1994 Vol. XLIX No. 11, he is prohibited from having sexual intercourse with his step daughter and the punishment for that offence is stated as (i) a fine of 4 pikul (baskets) plus (ii) takud (restitution) of 250 buah (articles F inclusive of fruits for purposes of settlement) plus (iii) prosis (gift) consisting of 2 pigs (one shall be a boar) and 2 fowls (one of which shall be a cock). Such mode of punishment is unknown in the common law jurisdiction. However, courts here have to take into consideration the native's personal law and punishment in G dealing with sentence in order to understand their understanding of how they perceived the unchaste act of incest. I am of the view that the punishment for incest under the appellant's customary law is mild and is not seen to be serious and grave as opposed to major religion or practice. In my opinion, the H appellant's cultural and customary prohibition and punishment must be taken into consideration more so when incest which was once seen only as unchaste act without legal sanction has been made an offence from 27 September 2001 and society like that of the appellant need to be educated on its impact taking into I considerations they are native people of Sarawak and may not have immediate access to the development of the law. In ordinary circumstances, in a case of this nature not involving issues of the offender or the like for a crime of incest as whole for a first

offender, between consenting parties, the term of imprisonment ought to begin with a statutory minimum of six years with whipping up to 10 strokes to reflect the seriousness and gravity of the offence. This line of sentencing will be reformative in nature and the minimum period of imprisonment will be within the parameters of deterrent and rehabilitative sentence in nature. Moreover, it will give the offender ample opportunity to consider his misdeed and turn into a new leaf. However, in this case there are a number of aggravating circumstances which calls for severe and harsh punishment.

The appellant here had an incestuous relationship with the stepdaughter who is likened to be his own daughter and a prohibited degree for marriage under his own customary law and comes before the court without any shame and remorse and says that the victim, aged 17 who is supposed to be in his custody care and control, consented. I consider this an abhorrent, despicable and dastardly crime; and that it must be given the statutory maximum in terms of imprisonment as well as whipping with the usual reduction for plea of guilt.

[27] In arriving at a decision, I took into considerations various principles discussed above and came to the following conclusions:

(i) the accused has committed a grave and serious offence warranting a maximum punishment under the law.

(ii) the accused is a first offender and comes from native community and has pleaded guilty. It is appropriate at least to give a discount of one third, *inter alia*, to reflect that justice must be tempered with mercy and take into consideration that the appellant has saved the trial court's time.

(iii) the accused has only committed one crime of incest though various charges have been preferred and the aggregate sentence if any must not exceed the statutory maximum as set out in s. 376B of the Penal Code.

(iv) the accused is a person going to reach the advance age and long term imprisonment may exceed his natural life.

(v) to arrive at a just sentence according to law, I have to exercise my revisionary powers mindful of the fact that in *Liaw Kwai Wah & Anor v. Public Prosecutor* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163, the court stated:

A Section 31 of the Courts of Judicature Act, 1964 confers on the High Court, in respect of criminal proceedings and matters in the subordinate courts, the powers of revision. And section 323(i), Criminal Procedure Code (the Code), empowers a Judge to call for and examine the record of any
B proceeding before any inferior criminal court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence, or order recorded or passed. Section 325 of the Code further provides that in any case, the record of proceedings of which had been called for by the Judge himself or which otherwise comes
C to his knowledge, the Judge may, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of the Code. Among the powers set out in section 325(i), Criminal Procedure Code, is the power of the court to enhance or alter the nature of the sentence imposed (see
D also section 316(b) of the Code).

…

We would observe that the power of revision is to be exercised in accordance with the law for the time being in
E force relating to criminal procedure. In the present case that law is the Criminal Procedure Code. We would also observe that the object of the revisionary powers provided for in the Code is:

> ... to confer upon criminal courts a kind of paternal
F or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other
G hand, in some undeserved hardship to individuals.
>
> (*Emperor v. Nasrullah & Others* AIR [1928] All 287).

it is also clear that the High Court may examine the record of proceedings in the subordinate courts "wherever it
H considers that in doing so the purpose of justice will be served, as for example, accused is subjected to a vexatious and groundless prosecution." (*Ramanathan Chettiyar v. Subrahmanya Ayyar* ILR 47 Mad 722).

I Duty of High Court

Basically, the duty lies with the High Court to see that the criminal law is properly administered by an inferior court.

> The Judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court. Where, for instance, a convicted person has scrupulous objection to invoke the jurisdiction of a High Court, either on a question of legality of conviction or error of law concerning the conviction or sentence, the Judge ought to call for and examine the record with a view to exercising the revisionary power to correct a miscarriage of justice.

For the reasons stated above, I am compelled to exercise both my appellate as well as revisionary powers with the object of imposing a sentence not exceeding the statutory maximum stated in s. 376B of the Penal Code. I hereby do so and make the following orders:

(a) The sentence of 10 years imprisonment and a whipping of three strokes for each offence with an order for sentence to run consecutively made by the learned Sessions Judge is set-aside and substituted by the following orders namely:

(i) the appellant be sentenced to 13 years and 3 months imprisonment and a whipping of 5 strokes for each offence;

(ii) the sentence of imprisonment to run concurrently.

(b) The sentence to take effect from the date of arrest.